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IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

TELEDYNE RISI, INC. d/b/a  
TELEDYNE ELECTRONIC SAFETY  
PRODUCTS,

Plaintiff,

v.

MARTIN-BAKER AIRCRAFT  
COMPANY LTD,

Defendant.

Case No. 2:15-CV-07936-SJO-GJS

Hon. S. James Otero

**DEFENDANT MARTIN-BAKER  
AIRCRAFT COMPANY LTD.'S  
MOTION IN LIMINE NO. 3 TO  
EXCLUDE OR LIMIT  
TESTIMONY OF PLAINTIFF'S  
EXPERT MARK NEWTON**

Trial: November 21, 2017  
Time: 9:00 a.m.  
Ctrm.: 10C

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## **I. INTRODUCTION**

Pursuant to Fed. R. Evid. 402, 403, and 702, Defendant Martin-Baker Aircraft Company Ltd. (“Martin-Baker”) moves *in limine* to exclude or limit the opinion testimony of Mark Newton (“Mr. Newton”) proffered by Plaintiff Teledyne RISI, Inc. d/b/a Teledyne Electronic Safety Products (“Teledyne”).

Teledyne designated Mr Newton as an expert purportedly “to calculate the economic loss suffered by” Teledyne as a “a direct result of breach of contract and unfair competition practices conducted by” Martin-Baker. *See* Ex. 1 (Newton Report). In fact, Mr. Newton’s expert report and purported opinions to a large extent are (1) devoted to matters no longer at issue in this case, (ii) based on pure speculation, or (iii) based on erroneous information or methodologies. Under the Federal Rules, this Court must act as a “gatekeeper” to preclude improper expert testimony. *See, e.g., Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). In the exercise of this function, the Court should exclude or limit the opinions of Mr. Newton, as set out below.

## **II. LEGAL STANDARD TO ADMIT EXPERT OPINION**

“The proponent of [an] expert . . . has the burden of proving admissibility.” *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Expert opinion is admissible only if the expert is qualified, testifies as to matters within the scope of his or her expertise, the testimony will be helpful to the jury in determining a fact in issue, and the opinion is both relevant and reliable. *See* Fed. R. Evid. 702.

The Ninth Circuit has identified six non-exclusive factors as guidelines for a trial court’s assessment of proposed expert testimony pursuant to Fed. R. Evid. 702 and the further standards announced in *Daubert*: (1) “[w]hether the opinion is based on scientific, technical, or other specialized knowledge”; (2) “[w]hether the expert’s opinion would assist the trier of fact in understanding the evidence or determining a fact in issue”; (3) “[w]hether the expert has appropriate qualifications – *i.e.*, some

1 special knowledge, skill, experience, training or education on the subject matter”;  
 2 (4) “[w]hether the testimony is relevant and reliable”; (5) “[w]hether the  
 3 methodology or technique the expert uses ‘fits’ the conclusions”; and (6)  
 4 “[w]hether the probative value is substantially outweighed by the risk of unfair  
 5 prejudice, confusion of issues, or undue consumption of time.” *United States v.*  
 6 *Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000); *see also Ollier v. Sweetwater Union*  
 7 *High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014) (“It is well settled that bare  
 8 qualifications alone cannot establish the admissibility of expert testimony.”)

9 Both *Daubert* and subsequent cases have emphasized that these factors are  
 10 not “equally applicable (or applicable at all) in every case.” *Daubert v. Merrell*  
 11 *Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (*Daubert II*); *Kumho Tire*  
 12 *Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (applicability of the *Daubert* factors  
 13 “depend[s] on the nature of the issue, the expert’s particular expertise, and the  
 14 subject of his testimony.”) Because of the fluid and contextual nature of the inquiry,  
 15 district courts are vested with “broad latitude” to determine “whether or not [an]  
 16 expert’s relevant testimony is reliable.” *Id.* at 152-53. But, “the duty falls squarely  
 17 upon the district court to act as a ‘gatekeeper’ to exclude testimony that does not  
 18 meet [Rule] 702’s reliability standards.” *Estate of Barabin v. AstenJohnson, Inc.*,  
 19 740 F.3d 457, 463 (9th Cir. 2014) (internal citations omitted).

20 Accordingly, in cases where *Daubert’s* specific discussion of the  
 21 admissibility of scientific principles does not strictly apply to proffered expert  
 22 testimony, its admissibility is primarily controlled by the requirements of (1)  
 23 “factual relevance” (which includes assessment of whether the evidence will be  
 24 helpful to the trier of fact and not unfairly prejudicial) and (2) “foundational  
 25 reliability.” *Bogosian v. Mercedes-Benz*, 104 F.3d 472, 479 (1st Cir. 1997); *Ollier*,  
 26 768 F.3d at 860 (“we have interpreted Rule 702 to require that expert testimony be  
 27 both relevant and reliable”); *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053,  
 28

1 1063 n.7 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003).

2 First, as to the relevance consideration, Rule 702 “requires that the evidence  
3 or testimony ‘assist the trier of fact to understand the evidence or to determine a  
4 fact in issue.’” *Daubert*, 509 U.S. at 591 (internal citations omitted). “‘Expert  
5 testimony which does not relate to any issue in the case is not relevant and, ergo,  
6 non-helpful.’” *Id.* at 591-92 (internal citations omitted.) As irrelevant evidence is  
7 always inadmissible under Rule 402, courts employ a higher standard than mere  
8 relevance in assessing this component of the test for admissibility of expert  
9 testimony.

10 This “consideration has been aptly described ... as one of ‘fit.’ ... ‘Fit’ is not  
11 always obvious, and scientific validity for one purpose is not necessarily scientific  
12 validity for other, unrelated purposes.” *Id.*; *see also Kumho Tire*, 526 U.S. at 150.  
13 Under this relevance or “fit” prong, the proffered testimony “must be ‘relevant to  
14 the task at hand,’ *i.e.*, [it must] logically advance a material aspect of the proposing  
15 party’s case.” *Daubert II*, 43 F.3d at 1315, quoting *Daubert*, 509 U.S. at 597;  
16 *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998) (relevance  
17 requires opinions that would assist the trier of fact in reaching a conclusion  
18 necessary to the case). Further, the *Daubert* “fit” test is not merely a recitation of  
19 Rule 402. *See United States v. King*, 703 F. Supp. 2d 1063, 1069 (D. Haw. 2010).  
20 Instead, due to the Supreme Court’s recognition that “[e]xpert evidence can be both  
21 powerful and quite misleading because of the difficulty in evaluating it,” under  
22 *Daubert*’s “fit” test the “judge in weighing possible prejudice against probative  
23 force under Rule 403 ... exercises more control over experts than over lay  
24 witnesses.” *Daubert*, 509 U.S. at 595; *see Mukhtar*, 299 F.3d at 1063 n.7  
25 (“[e]ncompassed in the determination of whether expert testimony is relevant is  
26 whether it is helpful to the jury, which is the ‘central concern’ of Rule 702.”).

27 Second, as to reliability, a court should exclude the testimony of an expert if  
28



1 it is not reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S. Ct.  
 2 1167, 1175 (1999). “Expert testimony ... is reliable if the knowledge underlying it  
 3 has a reliable basis in the knowledge and experience of the relevant discipline.”  
 4 *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2015).  
 5 The Supreme Court has suggested several non-exclusive factors for courts to  
 6 consider in assessing reliability<sup>1</sup>, but the test is ultimately “flexible,” and “the trial  
 7 court has discretion” to decide how to assess reliability “based on the particular  
 8 circumstances of the particular case.” *Id.* at 813-14 (internal citations omitted); *see*  
 9 *also Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014)  
 10 (same). However, an expert opinion must be excluded if it is (1) based on  
 11 subjective belief or unsupported speculation or (2) fails to assist the trier of fact in  
 12 understanding the evidence or determining a fact at issue. *Daubert*, 509 U.S. at 590-  
 13 91; *Ollier*, 768 F.3d at 861 (“personal opinion testimony is inadmissible as a matter  
 14 of law under Rule 702” and “speculative testimony is inherently unreliable.”)

### 15 **III. ARGUMENT**

16 Mr. Newton, in his report, opines that Teledyne has suffered **\$24,832,113.00**  
 17 in net present loss in relation to its Naval Aircrew Common Ejection Seat (NACES)  
 18 program claims and **\$47,205,889.00** in net present loss in relation to its Joint Strike  
 19 Fighter (JSF) program claims. For the reasons set forth below, these numbers are  
 20 grossly inflated by Mr. Newton’s inclusion of claims that are no longer at issue in  
 21 this case, the complete speculation underlying almost all of Mr. Newton’s key  
 22 assumptions, and his use of unreliable data and methodology.

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25 <sup>1</sup> Such factors include: (1) whether a theory or technique can be and has been  
 26 tested; (2) whether it has been peer reviewed and published; (3) the known or  
 27 potential error rate of the theory; and (4) whether the theory enjoys general  
 28 acceptance within the relevant scientific community. *See Daubert*, 509 U.S. at 593-  
 94; *Pyramid Techs.*, 752 F.3d at 813.



1 **IV. MR. NEWTON'S NACES PROGRAM OPINIONS**

2 **A. Teledyne's NACES claims are no longer at issue in this case; Mr.**  
 3 **Newton's related opinions must therefore be excluded**

4 A substantial portion of Mr. Newton's proffered testimony concerns an issue  
 5 that was eliminated from this case by the Court's ruling on the parties' cross-  
 6 motions for summary judgment, i.e., Teledyne's assumed future non-participation  
 7 in further contracts under the NACES program. (ECF #136.) As noted in Martin-  
 8 Baker's Motion in Limine No. 1, Teledyne's various NACES-related contentions  
 9 provided the basis for Teledyne's claims for tortious interference with contract,  
 10 tortious interference with prospective contract and violation of the UCL, which the  
 11 Court either dismissed on Martin-Baker's motion to dismiss for failure to state a  
 12 claim or its motion for summary judgment. (ECF #142 at 6-7) (citing ECF #33 at 6-  
 13 7 and ECF #136 at 12-13.) Any argument by Teledyne that its NACES-related  
 14 contentions are still in this case via its fraud and fraudulent concealment claims is  
 15 incorrect, for the reasons set out by Martin-Baker in its Motion in Limine No. 1.  
 16 (ECF #142 at 6-7.) Accordingly, Mr. Newton's opinions on the subject of  
 17 Teledyne's alleged damages in relation to the NACES program are irrelevant and,  
 18 therefore, must be excluded. *See Daubert*, 509 U.S. at 591 ("[e]xpert testimony  
 19 which does not relate to any issue in the case is not relevant and, ergo, non-helpful"  
 20 to the jury as it does not "fit" the factual dispute that jury is asked to resolve).

21 However, even if Teledyne's NACES claims were still at issue in this case,  
 22 which they are not, Mr. Newton's opinions regarding Teledyne's alleged damages  
 23 in connection with those claims must be excluded for the following reasons.

24 **B. Mr. Newton's opinions on Teledyne's alleged damages from "Lost**  
 25 **Fastr Sequencers" are based on pure speculation**

26 Mr. Newton's calculation of Teledyne's alleged damages in connection with  
 27 the NACES program are based on his assumption that, but for Martin-Baker's  
 28 alleged conduct, Teledyne would have, over the next *forty-three years* (from 2018

1 through 2060), sold 3,242 additional NACES sequencers to Martin-Baker. (Ex. 1 at  
2 13.) Mr. Newton calls these additional sequencers “Lost Fastr Sequencers.” (*Id.*) In  
3 turn, Mr. Newton divides these sequencers into two categories:

4 (1) 2,725 “FASTr sequencers” that Mr. Newton assumes will be sold to  
5 Martin-Baker as part of a “future retrofitting” by the U.S. Navy of the  
6 entire NACES fleet, that he assumes will start in 2019, (*id.* at 3, 13,  
7 and Schedule 4.0); and

8 (2) 213 “FASTr sequencers” that Mr. Newton assumes will be used for  
9 “new F-18 seats that will be manufactured beginning in 2018.”<sup>2</sup>

10 (*Id.* at 13.) Both of these assumptions are based on pure speculation, and the  
11 calculations upon which they are based must therefore be excluded.

12 **1. There is no evidence for Mr. Newton’s assumption that the**  
13 **U.S. Navy will retrofit the NACES fleet with new sequencers**

14 There is no evidentiary basis whatsoever for Mr. Newton’s assumption that  
15 the U.S. Navy will retrofit the entire NACES fleet of planes, whether starting in  
16 2019 or any time thereafter. Mr. Newton confirmed this at his deposition. (Ex. 2 at  
17 93:16-96:9; 214:23-215:5.) Accordingly, there is no basis for Mr. Newton’s  
18 calculations based on the 2,725 future NACES sequencers that Martin-Baker  
19 supposedly would have purchased from Teledyne for this non-existent retrofit.

20 Because there is no evidentiary basis that the future NACES retrofit on which  
21 Mr. Newton bases all of his calculations will actually occur, his opinion regarding  
22 the net present value of Teledyne’s damages arising from the “lost” sequencer sales  
23 associated with this retrofit must be excluded as unreliable and speculative. *See*  
24 *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1420 (9th Cir. 1998) (expert testimony

25 \_\_\_\_\_  
26 <sup>2</sup> Mr. Newton also assumes that Martin-Baker would purchase 304 future  
27 sequencers for “beyond economic repair replacement” for the NACES program. *See*  
28 Ex. 1 at Schedule 4. This assumption has no support, for the reasons set forth below  
with respect to the JSF program. *See infra* at 16-17.

1 must be “more than subjective belief or unsupported speculation” to be admissible);  
2 *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997) (“The ‘reasoning’ or  
3 ‘methodology’ of the expert must be examined by the court before the expert may  
4 be heard by the jury. Experts are not to testify to their subjective belief or  
5 unsupported speculation. The relevance and the reliability of their testimony, tested  
6 in terms of the principles they apply, must pass muster”); *Mesfun v. Hagos*, No. CV  
7 03-02182 MMM(RNBX), 2005 WL 5956612, at \*11 (C.D. Cal. Feb. 16, 2005)  
8 (“Opinions of an expert need not be accepted when they are based on nothing more  
9 than personal opinion or belief, instead of an understandable scientific [or  
10 experiential] basis.”).

11  
12 **2. There is no evidence for Mr. Newton’s assumption that non-Teledyne sequencers will be used for 213 new F-18 seats**

13 As to Mr. Newton’s second category of purposed “lost FASTr sequencers,”  
14 his assumption ignores that the evidence on which he relies for the supposed “lost  
15 213 sequencers” shows that, in fact, it will be Teledyne that will be supplying its  
16 FAST sequencer to the U.S. Navy for the next two lots of NACES sequencers  
17 under contract through FY 2017 (Lot 32a and b). (Ex. 3.) Mr. Newton’s  
18 calculations improperly include these 22 Teledyne sequencers in his claimed 213  
19 “lost FASTr sequencers. Beyond Lot 32b, any future contracts for sequencers for  
20 new F-18 seats are speculative because the contracts for such seats have not been  
21 issued by the U.S. Navy to Martin-Baker and there is therefore no certainty that the  
22 associated contracts for the sequencers for such seats will ever exist. *Lewis Jorge*  
23 *Construction Management, Inc. v. Pomona Unified School District*, 34 Cal. 4th  
24 960, 977 (2004) (lost profits from future, unawarded contracts are not recoverable).

25 **C. Mr. Newton’s opinion on Teledyne’s alleged damages from “Lost**  
26 **Fastr Repair Revenue” should be excluded**

27 In addition to supposed lost profit from the sale of the future “lost FASTr  
28 sequencers,” Mr. Newton calculates the present value of Teledyne’s lost income

1 from supposed future repairs of 1,947 “FASTr sequencers” that Teledyne will  
2 “lose” over the *next forty-three years* (from 2018 to 2060). (Ex. 1 at 13 (citing  
3 Newton Schedule 6.1).) This opinion must be excluded for several reasons.

4 First, Teledyne’s NACES-based claims do not support a claim for alleged  
5 lost future NACES repair income. As the Court noted in its summary judgment  
6 order, Teledyne has asserted that its fraud and fraudulent concealment claims are  
7 based on two alleged acts of “concealment” by Martin-Baker related to NACES  
8 (namely, that Martin-Baker did not inform Teledyne “that it **did not advise the**  
9 **Navy** that Teledyne’s proposed solution for the replacement of the FAST sequencer  
10 was pursuant to Martin-Baker’s enhanced specifications not the Navy’s  
11 specifications”; or that it “intended to present only one solution-Martin-Baker’s  
12 solution-to the Navy for the replacement of the FAST sequencer.”) (ECF #136 at  
13 11) (emphasis added.) However, Mr. Newton admitted at his deposition that he  
14 never actually reviewed the supposed “lost contract” on which Teledyne’s claim is  
15 based. (Ex. 2 at 99:8-102:23.) Mr. Newton did not know what kind of contract it  
16 was, whether it was a design and development contract, or when it was allegedly  
17 awarded. (*Id.* at 100:2-18.) Indeed, Mr. Newton admitted that he did no independent  
18 work to confirm whether a causal relationship existed between the contract he had  
19 never seen and the repairs he alleges that contract entitles Teledyne to. (Ex. 2 at  
20 102:14-103:10.) This makes Mr. Newton’s opinions entirely unreliable.

21 Second, Mr. Newton bases his estimates of the future revenue that Teledyne  
22 supposedly will not obtain from future repairs of the hypothetical “FASTr  
23 sequencer” on the prior revenue that Teledyne generated from two different  
24 sequencers, i.e., the NACES and FAST sequencers. (Ex. 1 at 13-14.) Yet, Mr.  
25 Newton made this assumption without ever reviewing or analyzing any of  
26 Teledyne’s prior repair contracts. (Ex. 2 at 254:5-7.) Indeed, Mr. Newton admitted  
27 at his deposition that he did not review a single prior Teledyne repair contract in  
28

1 forming his opinions. (*Id.*) He simply took assumptions that Teledyne provided and  
2 inserted those numbers into his damages model, i.e., an Excel spreadsheet. (Ex. 2 at  
3 194:11-17; 201:1-14.) Such testimony must be excluded as unreliable.

4 **D. Mr. Newton's opinions also are based on the inherent speculation**  
5 **that Martin-Baker would contract in the future with Teledyne**

6 There is no dispute that Martin-Baker is the designated sole source supplier  
7 of the NACES seat to the US Navy. (ECF #122-1 at 3 ¶ 22.) As such, Martin-Baker  
8 has the absolute right to select its supplier for each lot of sequencers. Despite this,  
9 Mr. Newton's opinions are based on the assumption that Martin-Baker would have  
10 exercised its discretion and authority to contract with Teledyne for the purchase of  
11 sequencers for the next **forty-three years** (from 2018 to 2060). This is pure  
12 speculation and Mr. Newton's calculation based on this speculation are unreliable  
13 and should not be admitted into evidence.

14 **E. Mr. Newton's Miscellaneous Errors and Unfounded Opinions**

15 In addition to the foregoing, Mr. Newton's proffered analysis includes a  
16 number of errors or unfounded opinions. First, Mr. Newton's opinion that Teledyne  
17 would have obtained a **68.87%** profit margin on future sales of "FASTr  
18 sequencers" to Martin-Baker over the next forty-three years suffers from the same  
19 critical flaws as his opinion that Teledyne would have achieved the same profit  
20 margin on future sales of JSF sequencers to Martin-Baker. *See infra* at 18, *et seq.*

21 Second, Mr. Newton admitted to using the incorrect component price for his  
22 calculations of the assumed lost revenue from Teledyne's assumed lost future sales  
23 of the "FASTr sequencer." Specifically, Teledyne's theory of the case is that but for  
24 Martin-Baker's alleged acts, it would be Teledyne's new MASS sequencer that  
25 would be used on the NACES program going forward. (Ex. 2 at 106:19-107:7;  
26 108:6-11.) Despite this, Mr. Newton admitted at his deposition that he did no  
27 analysis of the price at which Teledyne might have sold its MASS sequencer to  
28 Martin-Baker for the NACES program. (Ex. 2 at 250:18-20.) Instead, Mr. Newton

1 used the last-known price of an entirely different sequencer – the now-obsolete  
2 JSFAST sequencer – as a proxy for the future MASS price. (Ex. 1 at 13.) This has  
3 no basis in fact and is therefore unreliable. *See Cabrera*, 134 F.3d at 1420.

4 Third, Mr. Newton’s calculations for Teledyne’s assumed future lost  
5 sequencer sales assumes that the price of NACES sequencers would increase by  
6 2.5% year-on-year for the next forty-three years, (Ex. 1 at 10, n. 12); yet Mr.  
7 Newton admitted at his deposition that he did no analysis to substantiate this  
8 assumption. (Ex. 2 at 243:13-245:20.) This assumed price increase – which takes  
9 the putative prices of a NACES sequencer from \$18,740 in 2018 to \$71,285 in 2060  
10 (Ex. 1 at 12 (Schedule 4.0) – combined with Mr. Newton’s inflated profit margin –  
11 has the effect of substantially inflating Teledyne’s damages. Because this assumed  
12 2.5% uplift has no evidentiary or analytic support, it must be excluded.

13 **V. MR. NEWTON’S JSF PROGRAM OPINIONS**

14 Under California law, damages cannot be recovered for breach of contract  
15 unless such damage are “clearly ascertainable in both their nature and origin.” Cal.  
16 Civil Code Section 3301. While speculative damages are prohibited (i.e., damages  
17 must be “clearly ascertainable”), the amount of damages need not be proven with  
18 absolute certitude, if the damage is clear. *Acree v. General Motors Acceptance*  
19 *Corp.* (2001) 92 CA4th 385 (“The law requires only that some reasonable basis of  
20 computation be used, and the result reached can be a reasonable approximation.”)  
21 Lost profits only are recoverable if their extent and occurrence can be proven.  
22 *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191  
23 CA4th 435. Finally, in all cases, damages may not be unreasonable,  
24 unconscionable, grossly oppressive damages, or contrary to substantial justice. Cal.  
25 Civ. Code § 3359.

26 Mr. Newton’s calculation of Teledyne’s alleged damages in relation to the  
27 JSF program violate all of these provisions.  
28



1           **A. Mr. Newton's opinion on Teledyne's alleged damages from future**  
2           **lost JSF repair contracts should be excluded**

3           Mr. Newton first error with respect to Teledyne's JSF claims is to include  
4           calculations for a category of damages that is not recoverable by Teledyne in this  
5           case in any event –alleged lost profit from future repairs of JSF sequencers. (Ex. 1  
6           at 11.)

7           The general principle governing measure of damages for a breach of contract  
8           in California was enunciated by the California Supreme Court in *Lewis Jorge*  
9           *Construction Management, Inc.*:

10           Damages awarded to an injured party for breach of contract “seek to  
11           approximate the agreed-upon performance.” (*Applied Equipment*  
12           *Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515. The goal  
13           is to put the plaintiff “in as good a position as he or she would have  
14           occupied” if the defendant had not breached the contract. (24 Williston  
15           on Contracts (4th ed. 2002) § 64:1, p. 7.) In other words, the plaintiff is  
16           entitled to damages that are equivalent to the benefit of the plaintiff's  
17           contractual bargain. (*Id.* at pp. 9-10; 1 Witkin, Summary of Cal. Law  
18           (9th ed. 1987) Contracts, § 813, pp. 732-733.

19           34 Cal. 4th at 967-68. Under California Civil Code § 3358, the injured party's  
20           damages cannot exceed what it would have received if the contract had been fully  
21           performed on both sides.

22           Here, the basis for Teledyne's damage claims in relation to the JSF program  
23           is the June 24, 2003 Letter of Agreement (the “LOA”). However, the LOA is a  
24           supply contract, not a repair contract. Nowhere in the LOA is there any mention of  
25           any contractual entitlement for Teledyne to repair JSF sequencers. Confirming this,  
26           Teledyne ***does not*** allege in its Amended Complaint any contractual entitlement to  
27           repair JSF sequencers or claim in consequence thereof. Indeed, the word “repair” is  
28           not once used in the entire Amended Complaint. (ECF #34.) Given that Teledyne  
            has not alleged that Martin-Baker breached any contract for future JSF sequencer  
            repairs, Mr. Newton's opinions regarding the amount of lost income from such  
            future JSF repairs must be excluded. *See Daubert*, 509 U.S. at 591 (“[e]xpert



1 testimony which does not relate to any issue in the case is not relevant and, ergo,  
2 non-helpful” to the jury as it does not “fit” the factual dispute that jury is asked to  
3 resolve.).

4 **B. Mr. Newton’s opinions regarding Teledyne’s alleged lost profit**  
5 **from future sales of JSF sequencers to Martin-Baker should be**  
6 **excluded because they are based on pure speculation or erroneous**  
7 **assumptions**

8 Mr. Newton’s calculates Teledyne’s alleged lost profit from future sales of  
9 JSF sequencers to Martin-Baker by (1) assuming a future number of JSF sequencers  
10 that Teledyne would sell to Martin-Baker over the next forty-three years through  
11 2060; (2) taking an assumed starting sales price for this JSF sequencer and  
12 escalating it by 2.5% year-on-year for the next forty-three years (3) applying that  
13 escalated price to an assumed number of sequencer sales per year to generate a total  
14 amount of “lost revenue” and (4) applying a flat profit percentage of **68.87%** to this  
15 alleged lost revenue (before discounting it back to present value). Each of these  
16 steps in Mr. Newton’s calculations is unreliable, for the reasons set forth below, and  
should be excluded.

17 **1. Mr. Newton’s opinion that it would sell 9,300 future JSF**  
18 **sequencers to Martin-Baker is pure speculation and should**  
19 **be excluded**

20 Mr. Newton’s projections of future JSF sequencer sales by Teledyne to  
21 Martin-Baker is based, in the first instance on the U.S. Government’s current  
22 projected procurement plan for JSF aircraft. This procurement plan is set out in the  
23 U.S. Government Accountability Office’s 2016 report regarding the JSF program  
24 (the “2016 GAO Report”) upon which Mr. Newton relies. (*See* Ex. 1 at 6, n. 5; *see*  
25 *also* ECF #148-3 (GAO Report) As set forth therein, the U.S. Department of  
26 Defense (“DOD”) projects JSF aircraft purchases through 2038, at which point  
27 purchases will cease, and that during this remaining 20+ year period of time a total  
28 of **3,215 JSF additional aircraft** will be purchased. (*see also* Ex. 1 at 17 (Schedule  
6.0)). By way of comparison, from inception of the JSF program through 2015, the

1 JSF program has only ordered a total of **137 aircraft**. (Ex. 1 at 7, Table 2.)

2 There is no certainty, of course, that the 3,215 total number of JSF aircraft  
3 projected by the DOD will in fact be purchased. The reasons for this uncertainty are  
4 set out at length in the rebuttal report submitted by Martin-Baker expert witness  
5 (FTI), and include the need for Congressional appropriations year-after-year to fund  
6 such projected purchases, that the DOD's procurement plan for the JSF program  
7 has been decreasing, not increasing (having reduced by 14% since the initial  
8 projections), the inherent uncertainty in any future government contracts, the  
9 extreme cost associated with the JSF program that might result in further reductions  
10 or cancellations in the program, continued funding issues in the JSF program, the  
11 fact that there will be a change in U.S. Administrations by at the latest, 2024, which  
12 often is accompanied by a change in defense spending, the President's recent vocal  
13 criticism of the JSF program, and other factors. (ECF #148-4 at 2-8.) Such risk  
14 factors – none of which were assessed by Mr. Newton – render the number of  
15 future JSF aircraft purchases, beyond the immediate future, highly speculative and  
16 uncertain.

17 What is certain, however, is that there is no evidence whatsoever that  
18 Congressional appropriations and contracts for the purchase of more than the  
19 DOD's total projection of **3,215** additional JSF aircraft through 2038 will ever  
20 come into existence. Despite this, Mr. Newton's calculations are based on the  
21 assumption that there will be a total of **9,300** JSF sequencers supplied by Teledyne  
22 to Martin-Baker through the year 2060. (Ex. 1 at 4.) This is complete speculation  
23 and must be excluded. *See Citri-Lite Co. v. Cott Beverages*, 721 F. Supp. 2d 912,  
24 937–38 (E.D. Cal. 2010) (holding that plaintiff count not recover lost profits based  
25 on a hypothetical renewal of the parties' contract on determination that "there is no  
26 evidence that [defendant] would have renewed the Agreement once, let alone five  
27 times, and there is no evidence that [defendant] would have exercised the purchase  
28

option.”); *see also Lapinee Trade, Inc. v. Boon Rawd Brewery Co., Ltd.*, 91 F.3d 909 (7th Cir. 1996) (applying California law) (district court did not err in awarding three years of lost profits to beer distributor after supplier terminated at-will distributor agreement because three years is a “reasonable period”); *see also Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal. App. 3d 442, 469 (1990) (cutting off lost profits after five years).

2. **Mr. Newton’s assumption that there will be 1,259 “additional planes” is pure speculation**

Mr. Newton exceeds the DOD projections through a number of entirely unsupported assertions. The first of these is the assumption that the JSF program will order an additional 1,259 “additional planes” beyond the total 3,215 JSF additional aircraft projected by the DOD. (*See* Ex. 1 at 6.) The only support for this assumption is a stated “conservative estimate” by Teledyne. (*Id.*) At his deposition, Mr. Newton admitted that he only used this 1,259 unit number because two Teledyne representatives told him that they expected there would be 4,500 JSF aircraft ordered under the JSF program. (Ex. 2 at 121:19-122:13.) Mr. Newton further admitted that he did not know the basis on which these Teledyne people came up with this estimate. (*Id.* at 122:9-10.) Despite this, Mr. Newton assumed this speculative 4,500 number to be true, relied on it, and subtracted from it the actual total number of 3,215 JSF aircraft projected by the DOD, but not yet ordered or committed. (*Id.* at 121:19-122:13.) This is nothing but regurgitation of a self-serving assertion by Teledyne, and thus must be excluded. *See Dep’t of Toxic Substances Control v. Technichem, Inc.*, 2016 WL 1029463, at \*1 (N.D. Cal. 2016) (excluding expert’s testimony because, “[w]hen he is not simply speculating, [the witness] often does no more than regurgitate information given to him by other sources (including self-serving assertions by the [parties]). He [does] not analyze

1 his source materials so much as repeat their contents.”)<sup>3</sup>

2  
3 **3. Mr. Newton’s assumption that there will be 229 JSF “spares” is pure speculation**

4 Mr. Newton’s opinion also assumes that that there will be 229 “spare”  
5 sequencers supplied by Teledyne to Martin-Baker for the JSF program over the  
6 course of the next **forty-three years**. (Ex. 1 at 7.) The sole basis for this  
7 assumption, however, is that this is what Teledyne told Mr. Newton. (*Id.*)  
8 (“According to TESP, spare sequencers are typically carried at a rate of 5% of  
9 active in-service aircraft. As a result, I have used 5% to estimate 229 spare  
10 sequencers TESP would have delivered as part of the JSF program.”) At deposition,  
11 Mr. Newton admitted that he did not do any work to independently verify the  
12 accuracy or reliability of the 5% number provided to him by Teledyne. (Ex. 2 at  
13 181:2-6) (“Did you do any work to verify Teledyne's statement that spares are  
14 carried at a rate of 5 percent of active in-service aircraft? A No. We -- we did not do  
15 any particular review of that assumption that we make.”) He also admitted that “in  
16 hindsight, it would be preferable to have actual records to verify [the client’s  
17 estimate].” (*Id.* at 181:22-182:10.) As there is no evidentiary foundation whatsoever  
18 for Mr. Newton’s assumption of 229 future “spares,” Mr. Newton’s damage  
19 calculations based on this number also should be excluded.

20 **4. Mr. Newton’s assumption that Teledyne would sell an**  
21 **additional 3,710 “periodic replacement” JSF sequencers to**  
**Martin-Baker is pure speculation**

22 Mr. Newton dramatically inflates his calculation of Teledyne’s purported JSF  
23 damages by assuming that all JSF sequencers will need to be replaced after 20  
24 years. Ex. 1 at 8. On the back of this assumption, Mr. Newton calculates that

25 \_\_\_\_\_  
26 <sup>3</sup> Mr. Newton’s unsupported references to the number of aircraft purchased in the  
27 F-16 and F-18 programs is irrelevant and unreliable given his admission that he  
28 only cited these program at Teledyne’s direction, (Ex. 2 at 126:9-127:4), and that he  
did not undertake any analysis of these programs. (*Id.* at 127:5-128:5.)

1 Martin-Baker would purchase an additional **3,710** JSF “periodic replacement”  
2 sequencers from Teledyne, starting in **2036** and continuing for the next **twenty-**  
3 **four years** through **2060**. By way of a simple comparison, this projected additional  
4 3,710 JSF replacement sequencers is more than the total number of **3,215** JSF  
5 aircraft projected for purchase by the DOD through the entire duration of the JSF  
6 program.

7 Mr. Newton’s sole support for this critical assumption, again, is another  
8 naked statement provided by Teledyne. *Id.* (“According to TESP, the sequencers  
9 will have a service life of at least 20 years.”) No document, deposition testimony or  
10 evidence of any kind is cited by Mr. Newton to support this assertion. Instead, Mr.  
11 Newton admitted at his deposition that he, again, undertook no analysis whatsoever  
12 to confirm the reliability of Teledyne’s assertion, and simply took it to be true. (Ex.  
13 2 at 206:6-25.) Given that there is no evidentiary foundation whatsoever for Mr.  
14 Newton’s “regurgitated” assumption that all JSF sequencers will be replaced 20  
15 years after installation, Mr. Newton’s calculation of damages on the basis of this  
16 assumption must be excluded as pure speculation.

17 **5. Mr. Newton’s assumption that Teledyne would supply an**  
18 **additional 454 “beyond economic repair replacement” JSF**  
19 **sequencers to Martin-Baker is pure speculation**

20 Mr. Newton also assumes that Teledyne would have supplied an additional  
21 454 “beyond economic repair replacement” JSF sequencers to Martin-Baker. The  
22 basis for this assumption is the following statement: “The estimate for BERs is  
23 based upon the historical experience for NACES and FAST which is displayed on  
24 Schedule 6.2.” (Ex. 1 at 8.) This cannot be accepted as reliable, however, given that  
25 Mr. Newton admitted at deposition that he did no work to verify whether the  
26 “beyond economic repair replacement rates” for the NACES and FAST program  
27 were a valid proxy for the future replacement of the different Martin-Baker JSF  
28 Sequencer that will be used in the JSF program:

Q. "Beyond Economic Repair Replacements," that's your next section

1 in your report on Page 8 under JSF?

2 A Yes.

3 Q And you base this projected rate of beyond economic repair  
4 replacements on the historical experience for NACES and FAST; is  
5 that right?

6 A Yes.

7 Q As with the repairs, was this based on a assertion by Teledyne to  
8 you that you accepted that the beyond economic repair or replacement  
9 rates for NACES and FAST would be similar to the beyond 04:10:36  
10 economic repair or replacement rates for the Martin-Baker JSF  
11 sequencer?

12 A Yes.

13 Q Am I correct to assume that you did no independent work to verify  
14 whether the NACES, FAST 04:10:50 rates were a valid proxy for the  
15 beyond economic repair or replace rates for the Martin-Baker JSF  
16 sequencer?

17 A No.

18 Q So, again, this is just taking an assumption from Teledyne and then  
19 modeling it?

20 A Yes.

21 (Ex. 2 at 219:24-220:22.) Given this, Mr. Newton's assumption that Teledyne  
22 would sell 454 future "beyond economic repair units" to Martin-Baker is unreliable,  
23 and the damages he calculates on the basis of this assumption must be excluded.

24 **C. Mr. Newton's assumed future sales price of JSF sequencers is**  
25 **based on erroneous speculation**

26 Teledyne's theory of the case for its JSF claims is that Martin-Baker should  
27 have provided it with the build-to-print package of the Martin-Baker JSF Sequencer  
28 ("MBA JSF sequencer") to manufacture on an exclusive basis. (Ex. 2 at 225:17-21.)  
Yet, instead of using a hypothetical price for the sale of the Martin-Baker JSF  
Sequencer (for which data is available, see FTI Report at 9-10 (ECF #148-4), Mr.  
Newton uses the last-known sales price of the JSFAST sequencer for his  
calculation. (Ex. 1 at 9.) This is improper given that the JSFAST sequencer is no



1 longer capable of being produced. (Ex. 2 at 68:6-69:24.) Accordingly, the use of the  
2 JSFAST sales prices results in damages that are neither reasonable nor that flow  
3 directly from the alleged breach nor is it a natural result of the breach. *See San*  
4 *Diego Gas & Elec. Co.*, No. 15CV605-MMA (KSC), 2016 WL 6680205, at \*7  
5 (Contract damages must be those that “flow directly and necessarily from a breach  
6 of contract, or that are a natural result of a breach.”) Mr. Newton’s use of the  
7 JSFAST sales price as the basis for his damages calculations thus must be excluded.

8 As explained by FTI, Mr. Newton’s use of an erroneous starting price for his  
9 calculations, instead of the actual, far lower price of the Martin-Baker JSF  
10 sequencer, has the effect of inflating Mr. Newton’s damage calculations by at least  
11 \$20.3 million, ceteris paribus (ECF #148-4 at 9-10.)

12 **D. Mr. Newton’s opinion regarding Teledyne’s projected future**  
13 **profit margins must be excluded**

14 Mr. Newton opines that Teledyne would have obtained a **68.87%** profit  
15 margin on future sales of JSF sequencers to Martin-Baker over the next forty-three  
16 years. This is absurd and, for the following reasons, this opinion must be excluded.

17 First, Teledyne’s historic profit margin on sales of sequencers to Martin-  
18 Baker over the past 30 years has been **12-15%**. This alone proves that Mr.  
19 Newton’s calculated profit margin of **68.87%** is grossly inaccurate. The details of  
20 Teledyne’s historic profit margins are set out in FTI’s rebuttal report:

21 In the normal course of its business of selling sequencers to MBA over  
22 the past 30 years, TESP has submitted cost and pricing data to MBA.  
23 This cost and pricing data is required by U.S. law to be truthful,  
24 current, and correct. MBA relies on this TESP cost and pricing data to  
25 negotiate with TESP and award sequencer purchase contracts. In its  
26 cost and pricing data, TESP represents to MBA that its sequencer  
27 production costs include certain categories of costs, e.g., TESP’s  
28 overhead and selling, general and administrative costs (“SG&A”) and  
other burdens. Newton has not included these categories of costs in his  
analysis. This is incorrect given TESP’s prior representations.

TESP’s cost and pricing data also states the amount of profit that



1 TESP will obtain on the sale of sequencers to MBA. TESP's stated  
2 profit margins are between 12% and 15%.

3 (ECF # 148-4 at 10.) At his deposition, Mr. Newton did not dispute the accuracy of  
4 FTI's review of Teledyne's historic profit margin on sequencer sales to Martin-  
5 Baker, and that such margins have been **12-15%**. (Ex. 2 at 260:19-261:10; 282:20-  
6 283:18.) Indeed, Mr. Newton also admitted that if Martin-Baker were to purchase  
7 future JSF sequencers from Teledyne then he understood that Teledyne would  
8 achieve this same **12-15%** historic profit margin. (*Id.* at 284:12-25.) Finally, Mr.  
9 Newton confirmed that he understood that Teledyne's historic 12-15% profit  
10 margin on sequencer sales to Martin-Baker was charged **on top of** all costs incurred  
11 by Teledyne that were properly allocable to the manufacture of the sequencer. (Ex.  
12 2 at 284:2-17.) And, Mr. Newton admitted that Teledyne represented to Martin-  
13 Baker the amount of allocable costs that it incurred with respect to the manufacture  
14 of a sequencer, and that such Teledyne representations were required by law to be  
15 true and accurate. (Ex. 2 at 259:9-260:7.)

16 It is well-established that the measure of damages for lost profits for breach  
17 of contract is revenue less all expenses associated with production of the item in  
18 question. *See, e.g., Resort Video, Ltd. v. Laser Video, Inc.*, 35 Cal.App.4th 1679,  
19 1700 (1995) (Even if [plaintiff] was able to provide credible evidence of lost  
20 profits, it must be remembered that '[w]hen loss of anticipated profits is an element  
21 of damages, it means net and not gross profits. Net profits are the gains made from  
22 sales 'after deducting the value of the labor, materials, rents, and all expenses,  
23 together with the interest of the capital employed.'") Here, based on Teledyne's  
24 representations to Martin-Baker, after deduction of all expenses allocable to the  
25 manufacture of the "lost sequencers" on which Teledyne bases its claims, the  
26 maximum amount of profit that Teledyne would have obtained on future sales of  
27 sequencers to Martin-Baker is the **12-15%** profit margin that Teledyne has obtained  
28 on sequencer sales to Martin-Baker over the past 30 years. As such, Mr. Newton's

1 opinion that Teledyne would more than quadruple its maximum standard profit  
2 margin to **68.87%**, must be excluded as such opinion has no basis in the record,  
3 relies on unsupported assumptions and pose a great danger of misleading a jury.<sup>4</sup>  
4 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988).

5 As explained by FTI, Mr. Newton's use of an erroneous profit margin for his  
6 calculations, has the effect of inflating his JSF damage calculations by at least \$39.1  
7 million, ceteris paribus (ECF #148-4 at 11-12.)

8 **VI. CONCLUSION**

9 For the foregoing reasons, Martin-Baker respectfully requests that Mr.  
10 Newton's opinions be precluded or limited as set forth above, and set forth in the  
11 attached proposed order.

12  
13 Dated: October 17, 2017

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20 COMPANY LTD.

21  
22  
23 \_\_\_\_\_  
24 <sup>4</sup> One of the fundamental flaws in Mr. Newton's profit margin methodology is  
25 readily apparent, i.e., he ignores Teledyne's own financial statements to misstates  
26 Teledyne's fixed costs and then he assumes that such costs would remain constant  
27 for the entire forty-three year period over which he assumes Teledyne would sell  
28 additional JSF sequencers to Martin-Baker. (Ex. 2 at 292:13-19; 297:16-298:11.)  
Yet, Mr. Newton also admitted to doing no analysis as to the variability of  
Teledyne's supposed "fixed" costs. (*Id.* at 295:7-13.) This is inherently unreliable.